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No. 83-1414

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

Petitioner,

v.

LAURENCE G. RUSSELL, WILLIAM D. HANNA, AND EDDIE D. LANGWELL,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT F. GORE
REX H. REED
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

JOHN COSMIC
910 Barfield Building
Amarillo, Texas 79101
(806) 373-0711

ATTORNEYS FOR RESPONDENTS

April 9, 1984

QUESTION PRESENTED

(The issue phrased in "labor law" terms)

DO EMPLOYEES COVERED BY THE RAILWAY LABOR ACT HAVE THE RIGHT TO A "DECERTIFICATION" ELECTION TO REJECT CONTINUED UNION REPRESENTATION?

(The same issue re-phrased in terms of this case)

WAS THE FIFTH CIRCUIT CORRECT IN HOLDING THAT —

- **IT HAD JURISDICTION TO REVIEW THE NATIONAL MEDIATION BOARD'S REFUSAL TO GRANT RAILROAD EMPLOYEES THEIR STATUTORY RIGHT TO A REPRESENTATION ELECTION**

- **WHERE THE BOARD'S JUSTIFICATION FOR REFUSING TO HOLD THE ELECTION WAS ITS FINDING THAT THE ANNOUNCED INTENTIONS OF THE PROSPECTIVE REPRESENTATIVE, IF ELECTED, WAS TO TERMINATE THE EXISTING COLLECTIVE-BARGAINING AGREEMENT AND RETURN THE EMPLOYEES TO AN "UNREPRESENTED" STATUS?**

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Factual Background

Over forty years ago, the National Mediation Board ("NMB" or "Board") certified that the special agents and patrolmen of the Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") had elected the National Council of

Railway Patrolmens' Union, AFL, as their exclusive representative for collective bargaining. None of the employees who voted in the 1943 election are still in the bargaining unit and the petitioner, the Brotherhood of Railway Clerks ("BRAC"), is the successor in interest to the original representative.

Over the years BRAC negotiated a series of collective-bargaining agreements on behalf of the Santa Fe special agents and patrolmen; these agreements contain traditional "union-shop" language requiring that the bargaining unit employees become "members" of the union as a condition of continued employment.

By early 1981, some of the bargaining unit employees were dissatisfied with their union representation and were convinced that they would be better off if they were not represented by *any* labor union. These employees formed an association and solicited other bargaining unit employees to join them in a move to throw off further union representation. The respondents requested that their fellow employees sign authorization cards designating the respondent, Larry Russell, as their representative for all purposes under the Railway Labor Act ("RLA"). Notwithstanding BRAC's letters in opposition, a majority (over 64%) of the bargaining unit employees executed authorization cards designating Mr. Russell as their bargaining representative. Respondents then filed an "Application of Investigation of Representational Dispute" with the NMB seeking an election to have Mr. Russell designated as the representative of the bargaining unit.

Pertinent Procedural History

The NMB notified the interested parties that an application had been filed and invited statements of position. BRAC opposed the election arguing that (1) the RLA did not provide for "decertification" elections, and (2) a representative who desired to negotiate away the collective-bargaining agreement lacked the *intent* to represent the employees and thus should be disqualified. The respondents and Santa Fe urged that the NMB complete its investigation and hold an election. During the NMB investigation, the respondents made it very clear that Mr. Russell, if elected, intended to negotiate away the existing collective-bargaining agreement and return the employees to an unrepresented or non-union status.

On May 21, 1981, the Board issued its decision holding that respondent, Mr. Russell, "lacked the intent to represent the subject craft or class, if elected and certified." Accordingly, the NMB dismissed his application because if elected he would abrogate all existing collective-bargaining agreements thereby leaving the unit employees unrepresented.

Respondents filed suit in federal district court seeking declaratory and injunctive relief as well as a writ of mandamus. The complaint alleged two causes of action and named the NMB, BRAC and Santa Fe as defendants. The *First* Cause of Action was directed solely at the actions of the NMB in denying respondents their right to an election. This cause of action sought a declaratory judgment that the actions of the NMB were unlawful, arbitrary, capricious, an abuse of discretion, in excess of statutory authority, and violative of respondents' constitutional rights.

Additionally, respondents sought a writ of mandamus ordering the NMB to conduct a representation election to ascertain the duly authorized representative of the bargaining unit.

The *Second* Cause of Action was directed solely at the defendants BRAC and Santa Fe and sought to invalidate and enjoin the enforcement of the union-security clause in their collective-bargaining agreement — at least until after the representational dispute was resolved.

The NMB filed a motion for summary judgment arguing that the district court lacked jurisdiction to review its decisions. Over the objections of the respondents, the district court granted this motion and dismissed the *First* Cause of Action. Subsequently, and without opposition from the respondents, the district court granted Santa Fe's motion to dismiss and BRAC's motion for summary judgment on the *Second* Cause of Action.

Respondents filed a timely appeal limited solely to the district court's dismissal of the *First* Cause of Action. (Appendix J to the Petition for Writ of Certiorari, 66a-67a). The petitioner did not intervene in this appeal; rather it filed briefs as an "appellee." During oral arguments at the court of appeals, respondents challenged the petitioner's standing to participate in an appeal of a cause of action to which it was never a party.

On September 23, 1983, the Fifth Circuit — after carefully reviewing the legislative history of the RLA and this Court's prior decisions — held that, under the facts of this

case: (1) the federal courts have jurisdiction to review the NMB's decision, (2) the RLA authorizes representational elections even when that election might result in the selection of nonrepresentation, and (3) the NMB, by dismissing respondents' application, violated its statutory mandate. Accordingly, the court of appeals reversed and remanded the case to the district court to direct the NMB to carry out its statutory duties. (See Appendix A to Petition, 1a-28a).

The NMB did not seek a rehearing or rehearing en banc from the court of appeals and did not seek review by this Court. Notwithstanding the government's acquiesence in the court of appeals decision, the petitioner sought rehearing and rehearing en banc by the Fifth Circuit. These requests were denied. Petitioner then sought a Stay of Mandate while it petitioned this Court for review. The Fifth Circuit, in a written opinion (Appendix A hereto), denied the stay of mandate and the NMB is presently processing respondents' application for an election — some three years after it was filed.

For the reasons stated below, respondents oppose the petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

Although employees' right to freedom of choice under the Railway Labor Act is an important issue, this Court should decline to grant certiorari because:

(1) The decision below is consistent with this Court's prior rulings regarding the judiciary's very limited jurisdiction to review NMB decisions;

(2) The decision below gave full consideration to the issues and decided them correctly; and

(3) There are serious questions concerning the petitioner's standing to seek certiorari.

Respondent will very briefly address each of these points.

A. The Decision Below Is Consistent With This Court's Rulings Regarding Jurisdiction To Review Decisions Of The National Mediation Board.

When Congress enacted the Railway Labor Act and created the National Mediation Board, it did not make NMB decisions subject to judicial review; and this Court, in *Switchmen's Union v. NMB*, 320 U.S. 297 (1943), made it very clear that judicial review of NMB decisions is only available in exceptional cases.

The issue before the district court was whether it had jurisdiction to review the NMB's refusal to process respondents' application for a representation election. While acknowledging that that NMB decisions were very seldom reviewable, the respondents pointed out that the Board's decision: (1) deprived them of the statutory right to select a representative of *their own choosing*, (2) defeated one of the fundamental purposes of the RLA, and (3) violated their constitutional right to freedom of association. Notwithstanding these arguments, the district court decided that it lacked jurisdiction and dismissed respondents' cause of action against the NMB.

The court of appeals, only after very carefully reviewing both the legislative history of the statute and this Court's prior decisions, properly decided that it had jurisdiction to

review the NMB's decision. *See* Part V of the Fifth Circuit Opinion, Appendix A to Petition, pages 8a-15a. The court of appeals then addressed the merits of respondents' position.

B. The Fifth Circuit Panel Gave Full Considerations To The Issues And Decided Them Correctly.

It has been the respondents' position throughout this drawn out litigation that the Railway Labor Act provides for *employee* freedom of choice regarding who will or will not be their representative for purposes of collective bargaining. It is not the function of the government to determine who, if anyone, will be the employees' representative. As this Court pointed out in *BRAC v. Association for the Benefit of Non-Contract Employees,* 380 U.S. 650, 667 (1965),

> "[t]he Board, as we noted in Switchmen's Union, performs the 'function of a referee.' It does not select one organization or another; it simply investigates, defines the scope of the electorate, holds the election and certifies the winner."

The Court went on to point out that "[t]he legislative history supports the view that the employees are to have the option of rejecting collective representation," even if they have previously voted for union representation. *Id.,* at 669 n.5.

Notwithstanding the legislative history and the clear pronouncements of this Court, the Board at various times through out its history, has taken the position that it has a duty to encourage union representation! The Board has even gone so far as to state that "the act does not contemplate that its purposes shall be achieved, nor is it clear that

they can be achieved, without employee representation. . . ." *Administration of the Railway Labor Act by the National Mediation Board 1934-1957*, p. 15. This phenomenon was noted by Justice Stewart who, after citing the preceding quotation, went on to state that "the National Mediation Board has hewn to the mistaken belief that it has a duty to encourage collective representation." *BRAC v. Association of Non-Contract Employees, supra*, 380 U.S. at 677 (Stewart, J., dissenting).

The present case is but another example of the NMB improperly encouraging collective representation; this time by refusing to hold an election once it became convinced that a majority of the bargaining unit desired to reject further collective representation. By refusing to allow supposedly *misguided* employees to "trigger" the election mechanism, the governmental agency could ensure that its view of what was best for the employees prevailed! The Fifth Circuit saw through this Orwellian scheme. It struck down this impermissible limitation on employee freedom of choice and restricted the government's participation to its proper function — that of a referee. Review by this Court is not necessary.

C. The Petitioner Lacks Standing To Seek Review In This Court.

One final issue should be addressed. Does the petitioner have standing to seek this writ? Although BRAC was a defendant in the district court proceedings, it was never a party in the *only* cause of action placed before the appellate court. Rather than filing a motion to intervene, the petitioner simply filed an Appellee's Brief with the clerk of the court of appeals, thus becoming a "self-appointed" party.

Although respondents repeatedly raised the "standing" issue with the court of appeals, it was never formally

addressed by that court and the petitioner apparently enjoyed full party status. Notwithstanding this Court's Rule 19.6 providing that "all parties to the proceedings in the court whose judgment is sought to be reviewed shall be deemed parties in this court," the respondents maintain that the petitioner was never a proper party in the court of appeals and thus lacks standing to seek review of that decision.

CONCLUSION

For over three years the National Mediation Board and the incumbent representative have delayed the respondents and the other bargaining unit employees from exercising their statutory right to select the bargaining representative of *their* choice. Additionally, the bargaining unit employees have been compelled to contribute over $190,000 in union dues and service fees to support unwanted representation. Respondents respectfully submit that futher delay is unwarranted. The court of appeals correctly decided this case and the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT F. GORE
REX H. REED
c/o National Right To Work
Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

JOHN COSMIC
910 Barfield Building
Amarillo, Texas 79101
(806) 373-0711

ATTORNEYS FOR RESPONDENTS

APPENDIX A

ORDER DENYING STAY OF MANDATE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1466

LAURENCE G. RUSSELL, et al.,

Plaintiffs-Appellants,

v.

NATIONAL MEDIATION BOARD, et al.

Defendants-Appellees.

[Filed December 20, 1983]

Appeal from the United States District Court for the Northern District of Texas

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ORDER:

On September 22, 1983, a panel of this court ordered the National Mediation Board to hold an investigation and, if necessary, hold an election to determine the representation

issues presented by plaintiffs-appellants. Rehearing en banc was denied on November 28, 1983. By means of the present motion, the defendant-appellee, Brotherhood of Railway and Airline Clerks (Brotherhood), asks that the issuance of the mandate be stayed pending its filing of a petition for writ of certiorari to the United States Supreme Court, the stay to continue in force until the final disposition of the case by the Supreme Court. As justification for the stay, the Brotherhood contends that substantial questions of federal law exist which warrant further appellate review. This court specifically and thoroughly considered each of those questions in its panel decision. On rehearing, the Brotherhood did not raise any argument which was not considered in the panel decision; nor did it shed any new light on old arguments. Furthermore, it does not appear that the Brotherhood seeks to raise any argument before the Supreme Court that this court has not thoroughly and exhaustively considered in disposing of this case. It therefore appears that there is little likelihood that the Supreme Court's disposition of this case will be different from that reached by this Court.

Balancing the justification for staying the issuance of the mandate against the interests of the plaintiffs-appellants, the reasons for denying the stay are much more compelling. The plaintiffs-appellants have sought a determination regarding the Brotherhood's status as their collective bargaining representative to which they have been entitled, according to our determination, since March 1981. Any further delays should not be suffered by them.

For the above and foregoing reasons, the Brotherhood's motion for stay of the issuance of the mandate is DENIED.

/s/ E. Grady Jolly

UNITED STATES CIRCUIT JUDGE